No. 91-7611

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES EDWARD LANGSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for using or carrying a firearm during and in relation to a drug trafficking crime.

2. Whether the evidence was sufficient to support petitioner's conviction for conspiring to possess and distribute cocaine base.

3. Whether the court of appeals erred in declining to consider petitioner's claim that the district court improperly allowed the jury to use transcripts of tape-recorded conversations.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1485-1494) is reported at 949 F.2d 770.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1991. The petition for a writ of certiorari was filed on March 12, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiring to possess and distribute cocaine base, in violation

of 21 U.S.C. 846 (Count 1); distributing cocaine base, in violation of 21 U.S.C. 841(a)(1) (Counts 2, 3, 4, and 17); maintaining a residence to manufacture a controlled substance, in violation of 21 U.S.C. 856 (Counts 10 and 21); manufacturing and attempting to manufacture cocaine base, in violation of 21 U.S.C. 841(a)(1) (Counts 11 and 12); possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 13); and using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Count 14). He was sentenced to a total of 196 months' imprisonment. The court of appeals affirmed.

1. The evidence at trial showed that in 1989 and 1990 petitioner, along with his brother Ray Langston and a third man, Rodney Featherson, conducted a crack cocaine distribution operation out of a group of apartments located at 1702 Avenue B in Lubbock, Texas. Petitioner made numerous sales of crack cocaine to government informants; when he was unable to supply the requested amount, he referred the informant to one of the other men to complete the sale. Pet. App. 1488, 1491; Gov't C.A. Br. 6-15, 22-24.

On January 15, 1990, police officers searched Apartment Three at 1702 Avenue B and found petitioner in the process of manufacturing crack cocaine.[1] Petitioner was standing at a table that was covered with large quantities of cocaine hydrochloride

[1] Apartment Three was under the control of petitioner's brother, who had been given a key by the resident of the apartment. Pet. App. 1492 n.6.

and cocaine base, as well as plastic bags, baking soda, and razor blades. Under the mattress of a bed located six to eight feet from where petitioner was standing, the officers found a loaded .380 caliber semiautomatic pistol. During the search, petitioner sat on the bed with a woman who had also been in the apartment when the police arrived; he told her, "Don't say it's mine; don't say it's yours; don't say nothing." Pet. App. 1488, 1492-1493; Gov't C.A. Br. 10-12, 26-27.

At petitioner's trial, the government introduced tape recordings of conversations that took place in the course of the undercover drug transactions. Over petitioner's objection, the district court permitted the jury to use transcripts of the recordings that had been prepared by the government. Pet. App. 1489; Gov't C.A. Br. 17-18.

2. In the court of appeals, petitioner argued that the evidence was insufficient to sustain his conviction under 18 U.S.C. 924(c) for using or carrying a firearm during and in relation to a drug trafficking crime. The court of appeals held that the government may prove a violation of Section 924(c) "by showing that the weapon involved could have been used to protect or have the potential of facilitating [a drug trafficking] operation, and that the presence of the weapon was connected with the drug trafficking." Pet. App. 1492. In this case, the court found, there was "sufficient evidence for a jury to find that [petitioner] was in the apartment, knew that the gun was under the mattress, and that he could have used the gun to safeguard

the narcotics." Ibid. The court concluded that "a reasonable trier of fact could find a connection between the drug conspiracy and the firearm." Pet. App. 1493.

The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence to support his conspiracy conviction. The court found that the evidence showed that petitioner and his two co-conspirators "completed multiple drug transactions" at the apartments, and that they "communicated with one another and knowingly agreed to engage in the distribution of cocaine base." Pet. App. 1491.

Petitioner also argued that the district court erred in allowing the jury to use transcripts of the tape recordings of the undercover drug transactions, claiming that he did not have an adequate opportunity to review the transcripts prepared by the government and that the transcripts were inaccurate. The court of appeals stated that it was "unable to review the merits" of petitioner's contention because petitioner had failed to include the tape recordings and transcripts in the record on appeal. Pet. App. 1489-1490. In any event, the court concluded, petitioner had waived his right to challenge the jury's use of the transcripts by failing to "move for a recess or continuance after the transcripts were admitted in the district court." Pet. App. 1490.

ARGUMENT

1. Petitioner renews his contention (Pet. 4-7) that the evidence was insufficient to prove that he used or carried a

firearm during and in relation to a drug trafficking crime. The court of appeals properly rejected petitioner's fact-bound claim, and its decision is consistent with the decisions of other courts in similar circumstances.

The courts of appeals are in agreement that liability under Section 924(c)(1) "does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner," but only that "the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." United States v. Raborn, 872 F.2d 589, 595 (5th Cir. 1989). See, e.g., United States v. Medina, 944 F.2d 60, 66-67 (2d Cir. 1991), cert. denied, 112 S. Ct. 1508 (1992); United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.). Under that standard, there was ample evidence to support petitioner's conviction. The loaded pistol was readily accessible to petitioner in the apartment where he was manufacturing crack cocaine. The presence of large quantities of drugs and paraphernalia used in the manufacture of crack confirmed that the apartment was the location of a significant drug processing operation. Just a few steps from where petitioner was standing, the police found the loaded pistol, strategically located so as to be quickly and easily available for use.[2] Viewing the evidence in the light most favorable to the government, the jury certainly could have concluded that petitioner "used" the pistol

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[2] Petitioner's statement to the woman who was also present in the apartment confirmed that he knew that the gun was under the mattress.

to facilitate his drug trafficking crime. See United States v. Meggett, 875 F.2d 24, 29 (2d Cir.) (jury could reasonably conclude that loaded firearms found in defendant's apartment "were on hand to protect that apartment as a storage and processing point for large quantities of narcotics and that therefore the presence of weapons furthered or facilitated the narcotics operation"), cert. denied, 493 U.S. 858 (1989).

The decision below does not conflict with United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988), or United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989), as petitioner claims. In Feliz-Cordero, the police found a firearm in a bedroom dresser drawer in an apartment in which drug records, about $11,000 in cash, a beeper, and a small amount of cocaine were also found. However, there was no evidence that any of the defendants processed or distributed drugs in that apartment; instead, they distributed cocaine from another apartment in the same building. 859 F.2d at 251-252. The court reversed the defendants' convictions under Section 924(c)(1) upon finding that "there is no basis to conclude that the gun [in the bedroom dresser drawer] would have been quickly accessible if needed." Id. at 254. In subsequent decisions, the Second Circuit has confirmed that its reversal of the convictions in Feliz-Cordero was based on "the absence of proof that the defendants * * * had placed the weapon to have it available for ready use during the transaction." United States v. Meggett, 875 F.2d at 29; see also United States v. Torres, 901 F.2d 205, 217-218 (2d Cir.) (evi-

dence that gun was found under mattress in apartment used for drug trafficking was sufficient to sustain conviction under Section 924(c)(1)), cert. denied, 111 S. Ct. 273 (1990); United States v. Alvarado, 882 F.2d 645, 653-654 (2d Cir. 1989) (upholding conviction based on evidence that guns were found in desk drawer and locked safe in apartment used for processing and selling cocaine), cert. denied, 493 U.S. 1071 (1990).[3] In contrast to Feliz-Cordero, in which the gun was not even in the apartment that was used for drug trafficking, here the loaded pistol was found six to eight feet away from where petitioner was manufacturing crack cocaine.

For similar reasons, United States v. Theodoropoulos, supra, is also unhelpful to petitioner. The conviction in that case depended on a finding that three firearms found in a trash can on the porch outside the defendant's apartment were used in connection with the narcotics conspiracy. 866 F.2d at 597. The court of appeals reversed, explaining that "the difficulty" in the case was that "three of the * * * guns on which the government relie[d] were found inside a trash can on the porch rather than in the apartment, and were not even discovered by the FBI until after [the defendants] were in FBI custody." Ibid. Here, the pistol was not found in a remote location outside the apartment; rather, it was maintained within easy reach under a mattress.

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[3] As was recently noted in United States v. Hadfield, 918 F.2d 987, 997 (1st Cir. 1990), cert. denied, 111 S. Ct. 2062 (1991), Feliz-Cordero has been "limit[ed] * * * to its own facts" by the subsequent Second Circuit decisions.

2. Petitioner also challenges (Pet. 7-8) the sufficiency of the evidence to sustain his conviction for conspiring to possess and distribute cocaine base. That fact-bound claim does not warrant review by this Court.

Citing United States v. Tyler, 758 F.2d 66 (2d Cir. 1985), petitioner claims (Pet. 7) that a defendant's "helping a willing buyer locate a willing seller, standing alone" is not enough to establish his membership in a conspiracy. Petitioner's reliance on Tyler is plainly misplaced. That case involved a single drug transaction, in which the defendant referred an undercover officer who was "looking for some good dope" to a heroin dealer; the defendant later asked the officer for money and received 75 cents. The court of appeals held that that evidence was insufficient to support the defendant's drug conspiracy conviction. Id. at 67-70. Here, in contrast, the evidence showed that petitioner, his brother, and Rodney Featherson made numerous sales of crack cocaine from the same group of apartments, that on several occasions petitioner referred prospective purchasers to his brother, who in turn made referrals to Featherson, and that petitioner manufactured crack cocaine in an apartment that was in his brother's custody. The court of appeals correctly held (Pet. App. 1490-1491) that this evidence of "concert of action" was sufficient to sustain petitioner's conspiracy conviction.

3. Finally, petitioner contends (Pet. 8-11) that the court of appeals erred in declining to review his challenge to the jury's use of transcripts of the tape recordings of the under-

cover drug transactions. The court of appeals properly refused to consider that claim.

First, the court was unable to consider the merits of petitioner's contention because petitioner had failed to include the tape recordings and transcripts in the record on appeal. It is the "responsibility of the appellant to insure that all materials on which he seeks to rely are part of the record on appeal," and "[w]hen an appellant asserts that his conviction should be reversed because of a particular error and the record does not permit the reviewing court to evaluate the claim, the court will generally refuse to consider it." United States v. Hart, 729 F.2d 662, 671 (10th Cir. 1984), cert. denied, 469 U.S. 1161 (1985); see also United States v. Wilson, 904 F.2d 656, 659 (11th Cir. 1990), cert. denied, 112 S. Ct. 250 (1991); Andrews v. United States, 817 F.2d 1277, 1281 (7th Cir.), cert. denied, 484 U.S. 857 (1987); United States v. Gerald, 624 F.2d 1291, 1296 n.1 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981); Fed. R. App. P. 10(b)(2). Petitioner now claims (Pet. 10) that he could not provide the court of appeals with the transcripts because they were in the control of the government. But petitioner, who was represented by counsel throughout his trial and appeal, does not suggest that he made any effort to obtain the transcripts or to request that the government supplement the record with the transcripts. Under these circumstances, the court of appeals did not err in declining to consider petitioner's challenge to the jury's use of the transcripts.

The court of appeals also correctly held that petitioner waived his claim that he did not have an adequate opportunity to review the transcripts by failing to move for a continuance after the transcripts were furnished by the government. A defendant who claims to have been the victim of a "sneak attack" by the government must "ask explicitly that the court grant the time needed to regroup, or waive the point." United States v. Diaz-Villafane, 874 F.2d 43, 47 (1st Cir.), cert. denied, 493 U.S. 862 (1989).

Petitioner's claim that the decision in this case conflicts with United States v. Osorio, 929 F.2d 753 (1st Cir. 1991), is mistaken. The Osorio court did not hold, as petitioner suggests, that a defendant's claim of prejudice resulting from the government's delayed disclosure of evidence is preserved merely by objecting at trial. To the contrary, the First Circuit made clear in that case that a defendant's "'claim that he was unfairly surprised is severely undermined, if not entirely undone, by his neglect to ask the trial court for a continuance to meet the claimed exigency.'" Id. at 758 (quoting United States v. Diaz-Villafane, 874 F.2d at 47).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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